Supreme Court, U.S.
FILED
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(3)

No. 00-306

IN THE
Supreme Court of the United States

LINDA DENNO, AS PARENT, LEGAL GUARDIAN AND NEXT FRIEND FOR WAYNE DENNO,
Petitioners,

V.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, AN INDIVIDUAL AND ROBERT WALLACE, AN INDIVIDUAL,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

Frank R. Jakes
Counsel of Record
Johnson, Blakely, Pope,
Bokor, Ruppel & Burns, P.A.
100 N. Tampa Street, Suite 1800
Tampa, Florida 33602
(813) 225-2500
Attorney for Petitioners
Linda Denno and Wayne Denno

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

In accordance with Sup. Ct. R. 15.6, Petitioners submit the following reply to address new points in Respondents' Brief in Opposition.

I & II.

NO NEW POINTS ARE RAISED IN THESE ARGUMENTS

Respondents contentions that the Court of Appeals did not reject *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), nor deem *Tinker's* controlling nature eroded by *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), raise no new points. Since a simple review of the opinions of the Court of Appeals will permit the Court to assess these contentions, no additional argument by Petitioners is necessary.

III.

PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO A DETERMINATION OF THE SUBSTANTIVE CONSTITUTIONAL RIGHT OF A STUDENT TO THE DISPLAY OF A CONFEDERATE BATTLE FLAG

For the very first time in their Brief in Opposition, Respondents argue that Petitioners are estopped from seeking a determination of the

substantive constitutional right of Denno to display a Confederate battle flag. Respondents' claim of estoppel is predicated on a curious footnote in the majority's opinion on *sua sponte* rehearing.

> Neither party has argued that we must decide the *merits* of the substantive constitutional issue before addressing qualified immunity. And we believe that this appeal is one of those exceptional cases in which we are not required to do so.

Denno v. School Board of Volusia County, Florida, 218 F.3d 1267, 1275 n.5 (11th Cir. 2000) A14.

At all times since the inception of this case in 1996, Denno has vehemently argued that he possesses the substantive constitutional right to display a Confederate battle flag. Indeed, in its original opinion, the Court of Appeals agreed that Denno possessed such a substantive constitutional right under *Tinker*. *Denno*, 182 F.3d 780, 785 B9.

At no time did Denno concede or even suggest that the Court of Appeals could dispense with its obligation under *Wilson v. Layne*, 526 U.S. 603, 609 (1999) to decide the constitutional question before addressing the qualified immunity question. Significantly, Respondents never argued or requested such an approach by the lower court.

Respondents' estoppel argument is the penultimate "gotcha." The application of *Wilson v. Layne* was never an issue in the Court of Appeals.

Neither party briefed the question. The Court of Appeals never raised the question. Yet, Respondents now have the audacity to argue that Denno is estopped simply because he never expressly asked the Court of Appeals to follow the controlling law of this Court.

Denno's has consistently sought to vindicate his substantive constitutional right to the non-disruptive display of a Confederate battle flag. Respondents cannot evade review of this issue on estoppel grounds.

IV.

DENNO SOUGHT REVIEW OF HIS SUSPENSION ONLY TO BE REBUFFED

In their Statement of the Case and argument, Respondents incorrectly state that Denno never presented record evidence of his efforts to seek review of his suspension. Respondents' Brief at 2 & 15. Quite to the contrary, the district court record was replete with evidence of Denno's timely attempts to seek internal review.

First, not even Respondents contest the fact that Petitioners met with Principal Rowe on January 22, 1996, as the first step in the internal grievance process. Then, on January 30, 1996, Denno's counsel wrote the School Board's general counsel urging the School Board to uphold Denno's grievance.[1] On February 1, 1996, Principal Rowe's conclusory denial of Denno's

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[1] This evidence is found in the appellate record at R3-56-28&29.

grievance was transmitted by facsimile by the School Board's general counsel.

Denno's counsel repeatedly telephoned the School Board's general counsel seeking to advance the grievance process. None of these calls were returned. Accordingly, Denno's counsel wrote the School Board's general counsel on February 28, 1996 seeking further review of Denno's suspension.[2] This letter, too, was ignored.

On April 4, 1996, Denno's counsel bypassed the School Board's reticent general counsel and wrote the Assistant Superintendent renewing Denno's request for review.[3] Finally, in response to this renewed demand for grievance review, the Assistant Superintendent responded with the position that Denno had waived his right to review by waiting too long. Conveniently, the Assistant Superintendent never acknowledged Denno's repeated efforts to initiate further review through the School Board's general counsel.

Certainly, Respondents are correct that Petitioners were obliged to produce evidence of their attempt to pursue the grievance procedure. This the Petitioners did. Not even the district court held that Denno failed to establish a genuine issue of material fact on this issue.[4]

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[2] This evidence is found in the appellate record at R3-56-30&31. A copy of this letter is submitted as Appendix G.

[3] This evidence is found in the appellate record at R3-56-32&33. A copy of this letter is submitted as Appendix H.

[4] The district court merely found that "the evidence

Thus, the issue of whether a school board may avoid liability under 42 U.S.C. § 1983 by first abdicating decisions to individual schools, and then relying on a "catch-all" grievance procedure (particularly one such as the Respondents' which is not followed in practice) is squarely before the Court for review. To be sure, the conduct of the School Board in this case is disturbing. At every turn, Respondents have sought to employ bureaucratic trick and artifice to avoid review on the merits.

CONCLUSION

For the reasons set forth in the petition and above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Frank R. Jakes
Counsel of Record
Johnson, Blakely, Pope, Bokor,
Ruppel & Burns, P.A.
P.O. Box 1100
Tampa, Florida 33601-1100
Tel.: (813) 225-2500

Attorneys for Petitioners Linda Denno and Wayne Denno

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suggests that Denno's request for review was denied because the request to the area assistant superintendent was not made within the applicable time limits..." C14 (emphasis supplied). Naturally, a court cannot "weigh" conflicting evidence when ruling on a motion for summary judgment.

APPENDIX G

[Letterhead Omitted In Printing]

[Addresses Omitted In Printing]

FILE NO. 36629.94880

February 28, 1996

VIA FACSIMILE AND U.S. MAIL

Richard A. Kizma
School District of Volusia County
P.O. Box 2118
200 North Clara Avenue
DeLand, FL 32721-2118

Re: *Wayne Denno*

Dear Rich:

My telephone messages for the last couple of weeks have gone unanswered. I had hoped to discuss the matter of Wayne Denno's grievance directly with you in an informal manner. However, since that was not possible, I am writing in an effort to bring the matter to fruition.

Suffice to say that Wayne Denno and his mother, Linda, were very disappointed with the perfunctory rejection of their grievance by Principal Rowe. Moreover, we have received no information as to the timing of the hearing before the Assistant Superintendent. Clearly, if the school district is just "going through the motions", a final denial of the grievance should save everyone's time and effort. The Dennos can then pursue their formal legal remedies.

I look forward to hearing from you as soon as possible, but certainly before the end of the month. If I do not hear from you by that time, we will interpret the silence as a statement that the school district has no intentions of

it providing the Dennos a full and fair hearing as to their grievance.

Sincerely,

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL & BURNS, P.A.

/s/ Frank R. Jakes
Frank R. Jakes

FRJ/dls
Enclosure
33254

cc: Linda Denno

APPENDIX H

[Letterhead Omitted In Printing]

[Addresses Omitted In Printing]

FILE NO. 36629.94880

April 4, 1996

VIA FACSIMILE

Assistant Superintendent Lee Britton
School District of Volusia County
P.O Box 2118
200 North Clara Avenue
DeLand, Florida 32721-2118

Re: Wayne Denno Grievance

Dear Mr. Britton:

As you should be aware, Wayne Denno, a student at Pine Ridge High School in Volusia County and his mother, Linda Denno, have filed a grievance regarding his suspension on December 14, 1995 for displaying a three inch by five inch confederate battle flag during lunch period. Following an initial conference with Principal Sandra Rowe on January 22, 1995, during which Ms. Rowe did nothing other than listen to Mrs. Denno and her son, Ms. Rowe issued an unexplained and perfunctory denial of the grievance. I have attached a copy of her unexplained denial of the grievance.

Since that time, we have been endeavoring to secure a review of the grievance denial in accordance with the Code of Student Conduct and Discipline for the School District of Volusia County. Unfortunately, we have received no cooperation out of the School Board in the scheduling of this hearing. Therefore, in an effort to possibly avert the necessity for federal civil rights litigation,

on behalf of Wayne Denno and his mother Linda Denno, demand is made upon the Volusia County School Board to conduct a review of Ms. Rowe's initial denial of the Dennos' grievance. Your office my [sic] coordinate the timing of this hearing directly with my office.

Further, to permit the Dennos a meaningful review of the denial of their grievance, demand is made to provide the Dennos with all internal statements, documents, files and records relating to the December 14, 1995 incident. In this respect, we are advised that the incident was captured on a video tape controlled by school officials. This video tape must be made available to the Dennos. Moreover, at such time as the second hearing is scheduled, the Dennos demand the presence of Assistant Principal Roberts so that he may be examined under oath. Lastly, given the fact that Assistant Principal Roberts is the administrator responsible for taking the action which has given rise to the grievance, the Dennos request access to Mr. Roberts' personnel file.

I look forward to hearing from you at your earliest opportunity, but certainly no later than April 10, 1996.

Sincerely,

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL & BURNS, P.A.

/s/ Frank R. Jakes
Frank R. Jakes

FRJ/dls
Enclosures

cc: Richard Kizma, Esq.
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